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CORPORATIONS AT HOME AND ABROAD.

"A corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only in contemplation of law, and by force of the law; and where that law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty." So wrote Chief Justice Marshall in Bank of Augusta *v.* Earle.[1] One unlearned in the law, reading these words for the first time and noting the many corporations now in existence, which are organized under the laws of one State but have their executive offices and all or much of their property and do all or much of their business in another State or other States, might naturally think that there had been a notable change in the law since the days of the great Chief Justice.

A company, organized for the purpose under the laws of New Jersey, carries on a department store in New York City. Its place of business is here; the meetings of its directors are held here; here its officers and its employes do their work; here its customers are dealt with, its goods are displayed, sold, distributed and paid for. Once a year its stockholders, usually by proxy, meet in New Jersey and elect directors; there it has a nominal office and an agent, who does no business, and it pays a yearly tax. Or, if the

[1] 13 Pet. 519.

case be changed by substituting West Virginia for New Jersey as the State of incorporation, it may be true that no incorporator, stockholder, director or officer of the corporation ever has been or ever expects to be within "the boundaries of the sovereignty by which it is created." Yet we are told that the corporation has no legal existence out of such boundaries; there it dwells and thence it cannot migrate. The uninstructed might admit the last item of the proposition, that such company could not migrate from New Jersey or West Virginia, upon the ground that it did not seem ever to have been there; but the rest of it would seem to him to be obviously untrue. If he looked into the statute books he would find much to strengthen this view. He would find provisions for licensing foreign corporations, for taxing them, provisions requiring reports to be made by them, provisions enabling them to take title to property, provisions as to their suing and being sued in the courts. Under the Federal statutes he would learn that a corporation may be "found" and jurisdiction acquired over it in a district outside of the State of its incorporation. He would find here and there statutes applying in terms to foreign and domestic corporations alike, making no distinction between them. In New York and New Jersey, at least, he would find statutes authorizing the organization of corporations to construct and operate railroads wholly out of the State. Surely the activities of a corporation, the evidences that it is a living body, are not confined within the boundaries of the State of its incorporation. How, then, can it be said that its legal existence is so confined? Does *legal* existence wholly differ from existence as it is ordinarily understood? Or is there some peculiar limitation in the meaning of the word "corporation" as used by the courts, which does not conform to the common understanding?

The reason given for the statement that "a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created" is, that "it exists only in contemplation of the law and by force of the law." Turn back through the opinions of the Chief Justice in search of light as to his meaning and you will find that in the Dartmouth College case [1] he defines a corporation as "an artifi-

[1] 4 Wheaton 518.

cial being, invisible, intangible and existing only in contemplation of law." Here then is the key to the mystery. When he speaks of a corporation, he means something which cannot be seen or touched, and, inferentially, cannot touch. But our layman is not thinking of any such thing, but of a body of men who see and are seen, touch and are touched, a living force in the material world. He is interested in what these men are doing and can do, in the question whether they are or are not confined in their activities within any bounds. He knows that neither layman nor lawyer can think of the activities of corporations except as the activities of living men. He knows that legislation cannot really create, but can only regulate. And when he appreciates that the statements of the Chief Justice concern something which exists only in contemplation of law, and can neither be seen nor touched, he will, probably, lose interest in them. He is interested in the things that are. He prefers to deal with obvious fact rather than with legal fancy.

That the idea of an artificial person, or legal entity, created by incorporation, is a fiction, is beyond dispute. It is equally true that this fiction has been and still is of very great usefulness in the development of the law concerning corporations. It is no small part of the judicial service of Chief Justice Marshall that he in several cases clearly stated and rightly applied this idea. But for this conception the law as to corporations would now be far behind its present state, would doubtless be full of confusion and uncertainty. This fiction graphically expresses the essence of incorporation in a way which makes it easy to grasp. But it must not be lost sight of that it is a fiction. Though useful as an aid to reason, it must not be permitted to carry us beyond the facts.

Disraeli described the legal mind as "chiefly displaying itself in illustrating the obvious, explaining the evident, and expatiating on the commonplace." Speaking of this description, Chief Justice Russell said: "It was no part of his duty to point out, how disastrous it would be, if great advocates and strong judges were to conduct the legal business of the country without regard to the obvious, the evident and the commonplace, which, however boring they

may be in private life or in the House of Commons, are the sheet anchors of liberty and justice in courts of law, and cannot be illustrated, explained or even expatiated upon too much." The fiction of a legal entity created by incorporation is a product of a high order of thought; but useful as it has been and is, its use must be restrained by constant reference to the evident, the obvious and the commonplace; not only that error may be avoided, but also that the conclusions of the law may seem, as well as be, consonant with common sense.

That corporations are associations of individuals, is as true in law as it is obvious to common sense. Special charters read somewhat as follows: "A. B. and C., their associates and successors, are hereby made a body corporate, etc." General incorporation laws provide somewhat as follows: "Any three or more persons, who shall associate themselves together by written articles, stating, etc., shall, upon filing such articles in the office of the Secretary of State etc., become and be a body corporate." The individuals named in the special charters, or determined by the signing and filing of articles under general law, become a body corporate. These individuals and their associates and successors, that is, in case of stock corporations, the body of stockholders, are the corporation. By incorporation they secure the privilege of being regarded in law as though the body were a separate legal entity, distinct from the individuals composing it. This privilege is created by law, by act of the State, and has force only within the jurisdiction of the State; that is, within its boundaries. By fiction it is said that in this way the State creates an artificial being. What it really does is to give a *privilege* to an association of individuals to do business as if it were a distinct entity, the chief incident being freedom of the individuals from legal responsibility for the acts or omissions of the association. A State can give this privilege only within its own borders. Whether the association shall have a like privilege in any other State depends upon the will of such other State. Using the fiction again, the courts say that the artificial being created by incorporation, having life only by the law of the State of incorporation, exists by force of such law only within the bounds of that State. This

does not mean that the individuals associated together cannot act as an association elsewhere, but only that this peculiar privilege acquired under the laws of one State, is inoperative, by itself, in any other State.

That an association of individuals incorporated in one State may go into another State and do business there, would seem to be beyond dispute, if only the agreement of association permits it. It cannot secure the privilege of doing business as a body corporate in such other State without its permission. With its permission it may have the same privilege in the one State as in the other. And, theoretically, the privilege may be given by the second State to the associates as a body corporate under the laws of the first State or independently of the fact that the association has become a body corporate in the first State.

To explain, suppose an association is formed by an agreement, executed in duplicate, complete in itself, but containing all that is required under the corporation laws of either one of two States; and later, it is decided to obtain the privilege which incorporation gives; may not the articles be filed and the privileges be acquired in both States? In each State the privilege rests solely upon the law of that State. But the association which has it, has it in like manner in the one as in the other. There is nothing in the nature of the privilege, that an association shall be looked upon in law as an entity separate from those composing it, which prevents such privilege being granted to the same association by every State in the Union.

It is perhaps fortunate, with a view to the regulation of corporations, that the articles or certificates required to be filed to secure incorporation, must, as a rule, make clear the purpose of incorporation under the laws of a single State, so that it might very likely be impossible to find an actual case like that supposed. And this is largely due to the fiction of the artificial person created by legislative act. A person can be created but once. But the privilege, the giving of which is deemed by legal fiction to create an artificial person, might be given by each State with reference to its own bounds to any association so formed as to be capable of accepting it from each State. And this pos-

sibility, it is believed, is worth thinking of, when seeking to understand the essential nature of incorporation and to keep the fiction of an artificial being within proper bounds.

That an association of individuals, after acquiring from New Jersey the privilege which incorporation gives, often does—we might almost say, usually does—go outside of that State and do business, is obvious. And it is equally obvious that outside of New Jersey, as well as in it, the associates are not held responsible in law for the acts or omissions of the body. It seems then to have the same privilege outside of the State of incorporation as within it. How is this? It cannot have this privilege in New York by force of the law of New Jersey. It gets it here by comity, as it is said. New York by comity permits corporations of New Jersey to do business as such in New York. Here again the fiction is useful. It has aided much in the orderly development of the law. But it is still fiction. The reality is that New York grants to an association which has acquired this privilege in New Jersey the same privilege as a matter of interstate courtesy. Perhaps the word "grants" should be avoided. For in real estate law that involves something of permanency, while the rules of comity may be abrogated at any time. The privilege is held in New Jersey by a grant which under the Dartmouth College case is protected by the Constitution, except so far as the right is reserved to recall or modify it. The like privilege is held in New York only by a permit which may at any time be revoked. But so long as the permit lasts, the association does business in New York in like manner, with the same limitation of individual responsibility, as in New Jersey. It is deemed in law a body corporate in each State, by force of the law of each State. It is the same association in both States and has the same privilege.

Under the rules of comity, to some extent strengthened by statute, a corporation of New Jersey is permitted to do business in New York. The permit runs not to the association independently of its incorporation, but to it as a body corporate under the laws of New Jersey, or, in legal phrase, to the corporation created by such laws. The permit has conditions attached; but the powers of the body and method of exercise thereof, and the limitation of the

responsibility of the individual members are determined, with reference to its acts and omissions in New York by its New Jersey charter. As in the case of individuals, it becomes subject to different local laws as it passes from one State to another. But the law of its being is still the law of its origin. "Although, as a general proposition, a corporation must dwell in the State under whose laws it was created, its existence as an artificial person may be acknowledged and recognized in other States."[1] The artificial person is that created by the law of the domicile. That same artificial person may be acknowledged and recognized abroad, and when so acknowledged and recognized, whether merely by force of the rules of comity or by express statute, it may do business abroad under the same general conditions as to powers and liabilities as at home. What its powers are and how they are to be exercised, and to what extent, if at all, its members are responsible for its acts or omissions, are determined both at home and abroad by its charter.

The *association* may go away from home, and as a body corporate. Why, then, is it not proper to say, in accordance with ordinary thought, that *the corporation* may go wherever its existence is acknowledged and recognized? It has its home in one State; its capacities and the relations of its members to it and to its dealings are determined by the law of that State. But it can do business away from home under the same conditions, subject to the differences in local laws. Why, then, may it not *exist* abroad? In St. Louis *v.* Ferry Co.,[2] Judge Swayne, speaking of a corporation, says:

"It can exercise its franchises extra-territorially only so far as may be permitted by the policy or comity of other sovereignties. By the consent, express or implied, of the local government, it may transact there any business not *ultra vires*, and 'like a natural person may have a special or constructive *residence*, so as to be charged with taxes and duties and be subjected to special jurisdiction.' It is for the local sovereign to prescribe the terms and conditions upon which *its presence* by its agents and the conducting of its affairs shall be permitted."

In St. L. & S. F. R. Co. *v.* James,[3] Judge Shiras says of

[1] Christian Union *v.* Yount, 101 U. S. 352. [2] 11 Wall. 423.

[3] 161 U. S. 562.

the presumption as to the citizenship of stockholders that it "*accompanies* such corporation when it does business in another State."

In White *v.* Howard,[1] Judge Foster says:

"Now this corporation *brings with it* from New York its charter."

In Niagara Fire Ins. Co. *v.* Cornell,[2] Judge McPherson says:

"These companies have been by legislation invited to *come into the state. They are here and here lawfully.*"

And in R. R. Co. *v.* Koontz,[3] Chief Justice Waite says of corporations beyond the limits of the states creating them, as follows:

"If they are recognized and permitted to do business without limitation, express or implied, they *carry with them wherever they go* all their chartered privileges which can be used away from their legal home. Their charters are the law of their existence and *are taken wherever they go.*"

Are all these expressions, recognizing that a corporation may exist away from home, erroneous? Surely they are in accord with the common understanding. Are they not also consistent with what Chief Justice Marshall meant in Bank of Augusta *v.* Earle? An association of individuals securing from one State the privilege which incorporation gives, may go into another State and live there under like conditions, if it secures the same privilege there. Or, to use the fiction, the artificial being which by its creation in one State gets no *right* to live elsewhere, may yet live elsewhere, exercise its powers elsewhere, if only the local sovereign permits. It is, by fiction, the same legal person, wherever its existence, acquired in the home State, is acknowledged and recognized and permitted.

The corporation at home is subject to all the laws of the home State—general laws as well as the laws which make up its charter. Away from home, wherever its existence is recognized, it still looks to its charter for its powers and as to the management of its affairs, but, like a natural person passing from one State to another, it becomes subject to a different body of general law.

In White *v.* Howard,[4] it is said:

"Now this corporation brings with it from New York its charter, but does not bring with it the New York Statute of Wills and cannot bring it to be recognized as law within this jurisdiction."

[1] 38 Conn. 361. [2] 110 Fed. 816. [3] 104 U. S. 5. [4] 38 Conn. 361.

The usury law of Connecticut does not limit a Connecticut company in making loans in Illinois. But the limitations of its charter are operative wherever the corporation is permitted to do business, because by it is created the artificial being to which the permit runs.

Corporations are persons within the meaning of the 14th amendment to the Federal Constitution.[1] Corporations permitted to do business in a State other than that of their domicile, being recognized in such other State, are held to be "persons within its jurisdiction" so as to be entitled to the equal protection of its laws under that amendment.[2] A State may forbid the entrance of foreign corporations, but when they are within its bounds by its permission, the State cannot deal with them as it pleases. Conditions of the permission may be imposed; license fees may be required as a condition of coming or staying in. But as to general laws, tax laws, police regulations and the like, being lawfully within the State, they, equally with domestic corporations and natural persons, are entitled to the protection of the State and Federal Constitution.

Of franchises, the only one which goes with the corporation when it goes abroad, is that of corporate existence. If at home it is given the franchise of operating a railroad or a ferry, such franchise is of no effect abroad. The charter may give the company the capacity to acquire franchises abroad, but cannot give such franchises. As with the corporate franchise, one State *might* in terms give to a foreign corporation like franchises, for the operation of railroads or the like, as it is given at home. But this is rarely, if ever, done. So, for example, if question arises whether a corporation organized in one State and owning and operating a railroad in another may sell or mortgage its railroad with its franchise of owning, maintaining and operating the same, reference must be had to the law of the former as to its capacity to hold and dispose of such property, and to the law of the latter as to the alienability of such franchise.

A railroad company operating a railroad in two States must get its franchises of operating the railroad from each State with reference to the part of the road lying therein.

[1] Gulf C. & S. F. R. Co. *v.* Ellis, 165 U. S. 156.

[2] Niagara Fire Ins. Co. *v.* Cornell, 110 Fed. 816.

But its franchise of corporate being, or in other words, its corporate charter, may come from only one of them, this franchise being recognized in the other. The New York and New Haven Railroad Company, a Connecticut corporation, acquired a railroad franchise in New York. The State of New York alone could grant such franchise. But the grant in no way changed the corporate character of the company, although it involved a recognition in New York of the corporation created by Connecticut.

A railroad company is sometimes organized under the laws of two States, as when purchasers at foreclosure sale of a road in two States reorganize under the authority of both States, or when companies of different States are consolidated under like authority. What is the result? Is there then but one corporation? Or are there two, one in each State? Certainly there is but one organization, one body of stockholders, one board of directors, one set of officers and agents. All the property is held in one ownership and is so dealt with. If, for example, it is proposed to mortgage the entire road, the mortgage will be authorized by a single vote of a single board of directors, and, if necessary, by vote of a single meeting of stockholders, and will be executed by a single act of the company through its officers. In no respect, apparent to common sense, is there any duality of existence here, but a single entity seems to be exercising functions in two States. Is there any reason why the law should take a different view? If the fiction of an artificial being created by incorporation be used in connection with a company so organized, does it drive us to a conclusion contrary to the facts? If so, there would seem to be something the matter with the fiction. But does it? One State says that a company shall be deemed a body corporate, and fiction says that thus an artificial being is created whose existence is co-extensive with the jurisdiction of that State. Two States say the same thing to the same company, and fiction says that an artificial being is created whose existence is co-extensive with the jurisdiction of the two States together. The one fictitious assertion seems as reasonable as the other. But, it is asked, can two States join in an act of creation? There is no need of answering this conundrum. The idea of

creation is all fiction, and in the realm of fiction there are no constitutional limitations. To quote from the old story: "This is not a real mongoose." The one body, deemed to be a single body corporate in two States, in each by force of its own laws, is a reality. Its life is in fact a single and not a dual life. If the fiction, adopted as an aid to understanding the nature of incorporation, cannot be made to fit such a case without leading to a conclusion contrary to the facts, we had better drop the fiction and stick to the realities.

In R. R. Co. *v.* Harris,[1] Judge Swayne, in the opinion of the court, says:

"We see no reason why several States cannot, by competent legislation, unite in creating the same corporation or in combining several existing corporations into one."

In Covington &c. Co. *v.* Mayer,[2] the court holds a bridge company organized under the laws of two States to be "a single corporation clothed with the powers of two corporations," adding:

"It acts under two charters, which in all respects are identical except as to the source from which they emanate."

In Goodlatte *v.* L. & N. R. R. Co.,[3] it is said:

"Whether a corporation created by the laws of one State is also a corporation of another State within whose limits it is permitted under the legislative sanction to exert its corporate powers, is often difficult to determine."

And further recognition of the possibility of a single corporation existing under the laws of two States is to be found in St. Louis & S. F. Ry. Co. *v.* James[4] and in L. N. A. & Ch. Ry. Co. *v.* Louisville Trust Co.[5] The New York Court of Appeals has so fully accepted this view as to hold that a company formed by consolidation under its law and that of another State is not "incorporated by or under any general or special law of this State," within the meaning of the statute requiring payment of a tax upon incorporation.[6]

It is stated here and there, however, that the contrary is settled law (See Clark & Marshall on Private Corpora-

[1] 12 Wall. 65. [2] 31 Ohio St. 317. [3] 122 U. S. 391. [4] 161 U. S. 546.
[5] 174 U. S. 562.
[6] People *v.* N. Y. C. & St. L. R. R. Co., 129 N. Y. 474.

tions, Sections 117, 362 d. and cases cited). Such statements are chiefly based upon opinions in cases concerning the jurisdiction of the Federal courts, by reason of diversity of citizenship. We do not need to question the propriety of the decisions in these cases, in order to suggest caution in applying the reasoning of the opinions in other lines. The Supreme Court began by adopting a presumption that all the stockholders of a corporation were citizens of the State which chartered it—a presumption which was rather arbitrary, and under the conditions of to-day seems almost absurd. Then the presumption was made absolute, not to be overborne by proof. In this way the result was reached, in substance, that a corporation should be regarded as a citizen of the State of its incorporation, under the Federal laws as to jurisdiction. Perhaps it might have been better if the Court had simply said so at the outset. The conclusion seems unobjectionable. But the reasoning it is somewhat hard to make one's own. The opinions in the latest cases indicate that the judges find the same difficulty as others, and are simply content to stand upon the conclusions and extend them to new cases without much regard to the reasoning, upon the theory that in matters of jurisdiction it is more important to be constant and certain than to be logically right. The course of the Supreme court on this subject illustrates the remark of Judge Holmes, that "the life of the law has not been logic; it has been experience." We doubt whether any of its judges would commend the reasoning in the opinions in these cases for application in other lines, for the solution of other questions.

In connection with the formation of large companies to consolidate the properties of existing corporations and firms, it is quite common to perfect plans as to properties to be acquired and business to be done before determining from what State a charter shall be procured; and to make such determination in some cases without much regard to where the company's operations are to be carried on. No doubt this seems strange to some. New Jersey is sometimes criticised for chartering corporations to operate chiefly or wholly in other States, as though in so doing it committed a fraud upon such other States. Here again there

seems to be a misapplication of the fiction of the artificial being. New Jersey cannot give to a company a privilege which is operative by itself in any other State. If the privilege exists in any other State, it is by force of its own law, the statutory law or the rule of comity. If we use the fiction, we say that the right of a New Jersey corporation to do business as such in any other State exists only by permission of such other State. The act of New Jersey in no way constrains the action of other States. A New Jersey company may be excluded from any State or admitted upon any conditions.

In the same line of thought, it is apparent that in each State the legitimate basis of taxation against any corporation is only its property situated or its business done in the State, or both. As a matter of policy, this should be equally so in the State of incorporation as in other States, if double taxation is to be avoided, or if taxation is to bear a reasonable relation to benefit received ; although as matter of law the personal property wherever situated and all business wherever done may be taxed against a corporation in the State in which it is incorporated, because there it is deemed to have its domicile. This idea of domicile with relation to corporations, although necessary for convenience as to regulation, jurisdiction, &c., is technical, and is an outgrowth from the fiction of artificial being.

It would be easy to run out other conclusions from this line of thought. But it is just as well to stop here, letting the reader follow out the thought as he will. For the aim is to start thinking rather than to convince, to suggest rather than to demonstrate.

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